

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,
: CR-13-607
: (JFB)
-against- : United States Courthouse
: Central Islip, New York
TOMMY CONSTANTINE and
PHILLIP KENNER,
: March 26, 2018
Defendants. : 2 p.m.
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TRANSCRIPT OF CONFERENCE
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Government: RICHARD P. DONOGHUE, ESQ.
UNITED STATES ATTORNEY
BY: MATTHEW HAGANS, AUSA
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Proceedings recorded by mechanical stenography.
Transcript produced by CAT.

1 THE CLERK: Calling case USA v Kenner. Counsel
2 please state your appearance for the record.

3 MR. HAGANS: Good afternoon, your Honor.
4 Matthew Hagans for the United States, joined at table by
5 AUSA Diane Leonardo of our office.

6 THE COURT: Good afternoon.

7 MR. SIEGEL: Good afternoon, Judge. Jesse
8 Siegel for Mr. Kenner.

9 THE COURT: Good afternoon, Mr. Siegel.
10 Mr. Kenner is present.

11 Good afternoon, Mr. Kenner.

12 THE DEFENDANT: Good afternoon, your Honor.

13 THE COURT: As you know, we scheduled this in
14 connection with Mr. Kenner's letters to me indicating that
15 he wishes to proceed pro se representing himself in this
16 case.

17 I did ask Mr. Siegel to file a letter going
18 through some of the issues that Mr. Kenner had raised. I
19 did receive an ex parte letter of March 20th where
20 Mr. Siegel does explain the situation. Did Mr. Kenner get
21 to see a copy of this?

22 MR. SIEGEL: Yes, Judge.

23 THE COURT: Based upon my own observations of
24 Mr. Siegel's representation in connection with this case,
25 as well as the letter, I do not believe there is any basis

1 to conclude he has not been effective in his
2 representation of Mr. Kenner.

3 As I noted, Mr. Kenner has not asked me to have
4 another attorney. He asked me to represent himself but
5 because he raised issues regarding the effectiveness of
6 Mr. Siegel's representation I felt obligated to at least
7 have Mr. Siegel address them in some way to ensure that
8 the defendant was not proceeding pro se because of his
9 attorney's ineffectiveness and he was essentially left
10 with no alternative.

11 I don't believe that's this situation. The
12 letter indicates -- I did ask Mr. Kenner to think about
13 it, to speak to Mr. Siegel and then to report back whether
14 he still wishes to represent himself. Mr. Siegel
15 indicates that he does. I want to confirm that.

16 Mr. Kenner, have you had time to think about it?

17 THE DEFENDANT: Yes, your Honor.

18 THE COURT: And also with Mr. Siegel?

19 THE DEFENDANT: Yes, sir, we did.

20 THE COURT: Is it your intention to represent
21 yourself?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: I think as I explained to you last
24 time there are a series of questions that the law requires
25 me to cover with you so I can make sure that your decision

1 which is your absolute constitutional right to represent
2 yourself, my only obligation is to make sure that that
3 decision is knowing and intelligent and voluntary.

4 So the government has submitted a letter to me
5 of March 21st proposing certain questions. I'm going to
6 ask those questions because I think they are appropriate.
7 I may insert a few additional questions as we go along.

8 Mr. Kenner, first I want to make sure you
9 understand that you have the constitutional right to be
10 represented by an attorney at every stage of the
11 proceeding, including all of the stages that we still have
12 remaining in this case which include completion of the
13 forfeiture issue, sentencing, and any other issues that
14 might come up.

15 Do you understand that you are entitled to an
16 attorney at every stage of this proceeding?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Do you understand if you cannot
19 afford a lawyer the court will appoint one on your behalf
20 at no cost to you?

21 Do you understand that?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Do you also understand you have the
24 constitutional right to represent yourself as I just
25 mentioned to you, if you choose to do so?

1 Do you understand that?

2 THE DEFENDANT: Yes, your Honor.

3 THE COURT: And it is your desire to exercise
4 that constitutional right to represent yourself?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Have you ever studied law?

7 THE DEFENDANT: I have not.

8 THE COURT: Have you ever represented yourself
9 in a criminal action?

10 THE DEFENDANT: No, sir.

11 THE COURT: Do you understand that you are
12 charged with and have been convicted by the jury at trial
13 of counts one through four, seven and nine of the second
14 superseding indictment in this case charging you with
15 conspiracy to commit wire fraud, wire fraud, and
16 conspiracy to commit money laundering?

17 Do you understand you have been convicted of
18 those counts?

19 THE DEFENDANT: Yes, I believe I have been
20 convicted of those counts.

21 THE COURT: Do you understand based on those
22 counts of which you have been convicted the maximum term
23 of imprisonment as to each one of those counts is 20
24 years?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Do you understand at sentencing the
2 court could order the sentences of these counts to be
3 served consecutively, that is, one after the other, which
4 means that you are facing a total term of imprisonment at
5 the time of sentencing of up to 120 years in jail?

6 Do you understand that?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Do you understand at sentencing the
9 court must impose a special assessment of \$100 on each of
10 the counts of conviction separately?

11 THE DEFENDANT: I understand that.

12 THE COURT: Do you understand at sentencing the
13 court may impose a term of supervised release to follow
14 any term of imprisonment and also can impose fines in the
15 amount of \$250,000 as to each count?

16 THE DEFENDANT: I have been advised of that.

17 THE COURT: Do you understand at sentencing I
18 can also order you to pay -- I must order you to pay
19 restitution to the victims, that restitution is mandatory
20 in an amount to be determined by the court at sentencing?

21 THE DEFENDANT: I have been advised of that.

22 THE COURT: Do you understand at sentencing I
23 can also direct you to forfeit certain assets? As you
24 know we have this on going forfeiture proceeding.

25 You understand I can order forfeiture of assets?

1 THE DEFENDANT: Yes, sir, I am aware of the
2 ongoing procedure.

3 THE COURT: Have you received and reviewed the
4 copy of the presentence investigation report?

5 THE DEFENDANT: I never received a copy of the
6 report but Mr. Haley let me read it one time.

7 THE COURT: Obviously we'll make sure that you
8 get a copy of it.

9 I want to make sure you understand that there
10 are advisory sentencing guidelines that under federal law
11 I need to consider. They are not binding but they are one
12 of the factors I need to consider and the guidelines may
13 have an effect on your sentence because they are the
14 starting point for any sentence even though they are not
15 mandatory in any way.

16 Do you understand that?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: I'll come back to that in a minute.

19 Do you understand if you choose to represent
20 yourself, essentially we will talk about standby counsel
21 and a paralegal, but you are on your own and that I can't
22 tell you or advise you as to how you should handle any
23 aspect of your case so you can't, for example, ask me
24 questions along the line because I can't serve as an
25 advisor to you.

1 Do you understand that? No one will be able to
2 do that.

3 THE DEFENDANT: Referencing yourself, your
4 Honor? I do understand that, yes.

5 THE COURT: Yes.

6 THE DEFENDANT: Yes.

7 THE COURT: Are you familiar with the Federal
8 Rules of Evidence?

9 THE DEFENDANT: Not particularly.

10 THE COURT: Do you understand that the rules of
11 evidence govern what evidence may or may not be introduced
12 at a trial or can apply at hearings, including any hearing
13 in connection with sentencing or we had the forfeiture
14 hearing but it's possible we could have a supplemental
15 hearing and that in representing yourself you will have to
16 abide by these very technical rules and I'm not going to
17 be relaxing the rules because you are not an attorney.

18 Do you understand that?

19 THE DEFENDANT: Yes, sir, I do.

20 THE COURT: Are you familiar with the rules of
21 criminal procedure?

22 THE DEFENDANT: Not particularly.

23 THE COURT: Do you understand that those rules
24 govern the way a criminal action is handled at trial or at
25 a hearing or a sentencing in federal court and that you

1 are bound by those rules and, again, those rules aren't
2 relaxed for your benefit as a nonattorney?

3 THE DEFENDANT: I am aware of that.

4 THE COURT: These aren't on the government's
5 proposed questions but I want to make sure you understand
6 generally what the risks are of proceeding without an
7 attorney and representing yourself.

8 I think you probably understand this already but
9 I'm going to emphasize this to you. These proceedings
10 that we are having, continue to have, are very complicated
11 proceedings. The forfeiture in this case is a very
12 complicated issue factually and legally. Obviously
13 sentencing is very complicated. There are many factors
14 that the court has to consider. The guidelines can be
15 very technical.

16 There are a lot of cases that apply to
17 particular enhancements, whether this enhancement should
18 apply, not apply. These are all very complicated matters.
19 I have been a judge 12 years. A lot of times I have to
20 look up these issues myself because every case is
21 different. The law is very nuanced as to different
22 situations.

23 So I want to make sure that you understand the
24 complexity of the remaining issues in this case. I think
25 you do but I want to make sure you understand that. You

1 understand that?

2 THE DEFENDANT: Your Honor, I would be remiss if
3 I said I understand the complexity of each of the issues
4 if your Honor must be looking up some of the case work or
5 the other elements of issues you have to handle for
6 sentencing or other portion of the case.

7 I don't want to suggest that I understand.

8 THE COURT: I'm not suggesting you understand
9 every complexity but that's my whole point. I don't think
10 you understand every complexity and nobody understands
11 every complexity. Judges don't understand every
12 complexity. So I have to look them up.

13 But I also depend upon the lawyers. I do my own
14 research, but I depend on them to point me to cases and to
15 make arguments and that's helpful. So because you are not
16 an attorney that's a disadvantage for you because
17 attorneys are skilled in the law and the procedures and
18 how to research cases and how to make arguments to the
19 court and are obviously in a better position to do that
20 than someone who doesn't have a law degree and doesn't
21 have experience doing any of those types of things.

22 I want to make sure you understand that you
23 could be at a disadvantage because of the fact you are not
24 an attorney and that these issues are very complicated.
25 You understand that?

1 THE DEFENDANT: At the moment, your Honor, I do
2 understand that.

3 THE COURT: Also, just in general, apart from
4 the legal issues and the factual issues, we may -- even
5 though we had a forfeiture hearing, one of the risks
6 proceeding pro se is you don't know how the case will play
7 out. We don't know as we sit here today what else is
8 needed. Obviously we know there is additional briefing on
9 the forfeiture. Obviously there is a sentencing
10 proceeding, but, for example, we may have to have a Fatico
11 hearing regarding sentencing.

12 You would have to question witnesses at the
13 Fatico hearing, for example, and as I said it could be
14 possible that we could have to reopen the forfeiture
15 hearing. Somebody could come up where I say I have to
16 open this up and readdress this issue. There could be
17 issues in connection with forfeiture, in connection with
18 sentencing. All kinds of things come up in a case that I
19 can't predict and nobody can predict. Once you make this
20 decision it's not a situation where you can keep going
21 back and forth, like, oh, I think I need a lawyer for
22 this.

23 You understand that?

24 THE DEFENDANT: Yes, your Honor, I do.

25 THE COURT: And also just generally there is

1 some benefit, for example, at sentencing where not only in
2 sentencing does the defendant get to speak but the
3 attorney gets to speak on that person's behalf.

4 So you have two people talking then, not just
5 the defendant themselves, but again someone talking on his
6 behalf and you are going to not have that. It's obviously
7 just going to be you talking on your own behalf. Do you
8 understand that?

9 THE DEFENDANT: Yes, under the circumstances, I
10 understand that.

11 THE COURT: Do you have any questions of me with
12 respect to representing yourself or anything that I raised
13 with you so far?

14 THE DEFENDANT: Nothing that we have discussed
15 today, your Honor.

16 THE COURT: Is there anything else you want to
17 discuss with me before I ask you some final questions
18 about your willingness and desire to represent yourself?

19 THE DEFENDANT: I think I can wait until after
20 we are complete and there may or may not be a follow-up
21 question, your Honor, but thank you.

22 THE COURT: In light of the penalties to which
23 you are exposed at sentencing which I reviewed with you
24 today, or in any trial in this case if the case were to be
25 retried, I didn't mention that but that's always a

1 possibility, and in light of all the difficulties of
2 representing yourself that I discussed with you, do you
3 still desire to represent yourself and to give up your
4 right to be represented by a lawyer?

5 THE DEFENDANT: At the moment, yes.

6 THE COURT: What does that mean at the moment?

7 Again, once you make the decision it's not going
8 to be a situation where you go back and forth, you
9 understand that?

10 THE DEFENDANT: Yes, I understand that, your
11 Honor.

12 THE COURT: Is your decision entirely voluntary?

13 THE DEFENDANT: I believe it is.

14 THE COURT: Has anyone threatened you or forced
15 you to make this request to represent yourself?

16 THE DEFENDANT: I don't believe so.

17 THE COURT: Do you understand that any
18 statements that you make in the course of representing
19 yourself could be used against you by the government
20 either in the course of the sentencing of this matter or
21 any future proceeding related to this case, do you
22 understand that?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Are there any other questions that
25 the government wants me to cover with the defendant?

1 MR. HAGANS: No, your Honor.

2 THE COURT: Mr. Siegel, do you think there are
3 any other questions I need to ask Mr. Kenner?

4 MR. SIEGEL: No, Judge.

5 THE COURT: On the basis of my observations of
6 Mr. Kenner, not only here in the courtroom today, but
7 obviously this case has a long history, I have had many
8 colloquies with him on many different issues over time
9 including representation by his lawyers, I heard him
10 testify at the trial for many days, I believe that his
11 decision to proceed pro se is knowing and voluntary, that
12 he's conscious of the risks that are involved. I have
13 done my best to make him aware of those risks, and,
14 therefore, I believe that the standard under Fretta,
15 F-R-E-T-T-A, has been satisfied in terms of me satisfying
16 myself that this is a knowing and voluntary choice and I
17 will allow him to proceed pro se in the case as is his
18 constitutional right to do so.

19 Mr. Kenner, the only remaining issue I have for
20 today, well, two issues, if you need more time for the
21 deadlines I will obviously give you a little bit of
22 additional time. I would ask Mr. Siegel that you pass any
23 work that you have done to Mr. Kenner. I would hate for
24 any work that you have done to be wasted if he can decide
25 whether he wants to use it or not, but certainly you

1 should make all your work product available to him.

2 Okay?

3 MR. SIEGEL: Yes, Judge.

4 THE COURT: And then I assume, Mr. Kenner, that
5 you would like to have standby counsel and a paralegal
6 with that counsel to assist you, is that accurate?

7 THE DEFENDANT: Yes, your Honor.

8 THE COURT: Mr. Siegel suggested in his letter
9 that he doesn't really have a paralegal and he's a sole
10 practitioner, but my view on this and I'll be guided by
11 you and Mr. Kenner, Mr. Siegel, you obviously put a lot of
12 time in this case and I would hate even though you would
13 only be standby counsel for me to have another lawyer come
14 in and become familiar with the whole case, just to even
15 operate as standby counsel.

16 I don't think it is particularly productive, if
17 it can be avoided. Even if you don't have a paralegal, if
18 that's the only thing holding you back I would authorize
19 under the CJA act for you, I don't know how it would be
20 done, but to utilize the services of someone to act as a
21 paralegal on a temporary basis, in other words, on an
22 hourly rate consistent with the CJA rate because I think,
23 assuming your relationship with Mr. Kenner hasn't
24 deteriorated to the point where you don't think you can
25 function in that capacity as standby counsel, I think it

1 would be better for you to stay on the case given how much
2 time and knowledge you have about the case.

3 Are you willing to do that if Mr. Kenner is okay
4 with that?

5 MR. SIEGEL: Yes, Judge.

6 THE COURT: Okay.

7 Mr. Kenner, you heard what I was suggesting that
8 he would stay on the case as your standby counsel. I
9 would authorize him under the CJA act to have a paralegal
10 assist him to the extent you need paralegal work done.
11 You mentioned an investigator. I would have to hear more
12 about why you would need an investigator. I do that for
13 defense lawyers. When they want to investigate they have
14 to write to me and explain why but, again, he can assist
15 you if you think that was necessary in obtaining one and
16 working with one. Obviously when you are in jail it's
17 hard to work with someone on the outside in that way.

18 Is that okay with you?

19 THE DEFENDANT: Yes, that's fine for Mr. Siegel
20 to stay on and if we could have a paralegal and then I can
21 address your Honor directly about the need if necessary
22 for an investigator.

23 THE COURT: On that type of issue that deals
24 with your defense you can write that letter. You don't
25 have to provide it to the government because that would go

1 into your defense lawyer's -- for example, when they ask
2 for an investigator they don't tell the government why
3 they want it. They write a letter to me what's called
4 ex parte explaining why they need it and if I think it's
5 necessary I authorize it.

6 Other things obviously the government would get
7 to see, but that particular letter you wouldn't have to
8 provide a copy to the government. Okay?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: On the dates, I don't have in front
11 of me what the date is, but you want an extension of that
12 date?

13 THE DEFENDANT: Yes, at least that would give us
14 an opportunity for Mr. Siegel to pass the information,
15 either by himself or through a new paralegal to come visit
16 with me.

17 THE COURT: What do you suggest then?

18 THE DEFENDANT: Your Honor, under the
19 circumstances, and in order to allow Mr. Siegel to acquire
20 a paralegal through whatever CJA procedure is necessary,
21 if we could have 30 days and I could receive both the
22 information Mr. Siegel has put in place already.

23 THE COURT: 30 days from today?

24 THE DEFENDANT: From April 2nd, if we just
25 extend it.

1 THE COURT: May 2nd?

2 THE DEFENDANT: That would be fine, your Honor.

3 THE COURT: Okay.

4 THE DEFENDANT: I do appreciate that.

5 THE COURT: We'll move the government's date, I
6 don't remember how much time you had under the prior
7 schedule.

8 MS. LEONARDO: We have 30 days also, your Honor,
9 so if we could have June 2nd.

10 THE COURT: That's a Saturday, you want June
11 4th?

12 MR. HAGANS: That's fine, your Honor.

13 THE COURT: Did we have a date --

14 THE DEFENDANT: You had not calendared one yet,
15 your Honor.

16 You suggested about a month or so so you would
17 have time to read the motions.

18 THE COURT: How about July 18th or so, the week
19 of July 16th, is that okay?

20 Mr. Siegel, obviously because you are standby I
21 would want you to be here too.

22 MR. SIEGEL: Right, Judge. I'm actually going
23 to be away starting July 21st for a week. So I will be
24 here the week before then.

25 THE COURT: Okay.

1 The 18th then, let's say 10 a.m. on the 18th.
2 Obviously we will have to check with Mr. Constantine and
3 his counsel because I would want to do it all at once.

4 (There was a pause in the proceedings.)

5 MR. SIEGEL: That's fine for me, Judge.
6 Judge, can I just have a minute, though?

7 THE COURT: Yes. Is that okay with the
8 government, that date and time?

9 MR. HAGANS: Yes, your Honor.

10 THE COURT: Go ahead, Mr. Siegel.

11 MR. SIEGEL: Thank you, your Honor.

12 (There was a pause in the proceedings.)

13 MR. SIEGEL: Okay, Judge. We are good.
14 Thank you.

15 THE COURT: All right.

16 MR. HAGANS: Thank you, your Honor.

17 Your Honor, if I may just raise one additional
18 matter and I want to be cautious and say I haven't
19 researched this explicitly, but in light of Mr. Siegel's
20 current status as standby counsel I wonder if it's worth
21 reiterating to the defendant that the general maximum he's
22 entitled to counsel but not his choice of counsel I expect
23 that's true for standby counsel as well.

24 Given the history of this case and the
25 defendant's multiple representation situations, the

1 government would respectfully request that the defendant
2 be reminded that if his relationship for whatever reason
3 were to break down with Mr. Siegel he may not get another
4 standby counsel appointed afterwards.

5 I understand that would be up to your Honor
6 ultimately.

7 THE COURT: I think he understands and my sense
8 is that, Mr. Kenner, the fact he said he's willing to
9 continue him as standby counsel I think shows to me he is
10 making every effort to keep Mr. Siegel.

11 Mr. Hagans is correct, Mr. Kenner, that what
12 applies to attorneys also applies to standby counsel. You
13 can't have a situation where you keep asking me to replace
14 standby counsel. I have the discretion to say it to you
15 at some point no. I'm not going to have another attorney
16 come on the case and get familiar with the case if I don't
17 feel you demonstrated a sufficient reason to replace
18 counsel, but obviously we are not at that stage.

19 But you understand that, right?

20 THE DEFENDANT: Yes.

21 That was an excellent point by attorney Hagans.
22 I appreciate that, your Honor.

23 THE COURT: Okay.

24 All right?

25 MR. HAGANS: Thank you, Judge.

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THE COURT: Have a good day.

THE DEFENDANT: Thank you, your Honor.

(The matter concluded.)